

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	
)	
Amendment of Section 73.202(b),)	
FM Table of Allotments,)	MM Docket No. 01-143
FM Broadcast Stations,)	RM-10153
(Noblesville, Indianapolis, and Fishers,)	
Indiana))	
)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 28, 2003

Released: May 30, 2003

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a *Notice of Proposed Rule Making*¹ issued at the request of INDY LICO, Inc., ("INDY LICO"), licensee of Stations WGRF(FM), Channel 230A, Noblesville, Indiana, and WGLD(FM), Channel 283B, Indianapolis, Indiana, proposing the reallocation of Channel 230A from Noblesville, Indiana, to Fishers, Indiana, as the community's first local transmission service, and the modification of Station WGRF(FM)'s license to reflect the change of community. It also proposes the reallocation of Channel 283B from Indianapolis to Noblesville, Indiana, to retain the community's first local transmission service and the modification of Station WGLD(FM)'s license to reflect the change of community. In response to the *Notice*, Petitioner and SCI Broadcasting, Inc. ("SCI") (jointly "Petitioners")², licensee of Station WQKC(FM), Channel 229B, Seymour, Indiana, filed comments and an amended proposal. That amended proposal requests an alternate site for Channel 230A at Fishers that would be short-spaced to Station WQKC(FM) at Seymour. It proposes to remove that short-spacing by substituting Channel 230A for 229B at Seymour, reallocating Channel 230A from Seymour to Sellersburg, Indiana, and modifying Station WQKC's license to reflect the change of community. On February 21, 2003, Petitioner filed a Supplement in response to a request from staff. For the reasons discussed below, we are modifying the respective licenses of Station WGRF and Station WGLD as originally proposed and dismissing the amended proposal in this docket. The amended proposal will be considered in a separate proceeding.

2. Petitioners request that the Commission entertain their amended proposal in this proceeding because SCI, a new purchaser of Station WQKC, is willing to change the station's community of license from Seymour to Sellersburg. In their Supplement, they also argue that the Commission's policy enumerated in *Taccoa, Sugar Hill and Lawrenceville, Georgia*,³ should not apply

¹ *Noblesville, Indianapolis and Fishers, Indiana*, 16 FCC Rcd 13072 (MMB 2001).

² INDY LICO and SCI have the same parent corporation.

³ *Taccoa, Sugar Hill and Lawrenceville, GA*, 16 FCC Rcd 21191 (MMB 2001) (in the absence of a substantial justification based on new and reasonably unforeseeable events, a new or revised proposal will not be processed in the docket in which it is filed but will be dismissed or treated as a new proposal in a separate proceeding).

in this case.

3. This case predates *Taccoa* and involves a different set of circumstances.⁴ Petitioners argue that *Taccoa* should not apply because it predates this case and because we stated in *Taccoa* that its holding would apply to future counterproposals. We disagree and conclude that *Taccoa* should be extended to the facts of this case. As a general matter, we will not permit a party in a rulemaking proceeding to change the originally proposed reference coordinates in order to create a conflict with its earlier filed proposal, absent a substantial justification based on new and reasonably foreseeable intervening events. We find that Petitioners have failed to provide such a justification. Accordingly, we will grant Petitioner's original proposal and, without considering the alternate site at Fishers, initiate a new proceeding proposing the substitution of Channel 230A for Channel 229B at Seymour, Indiana, the reallocation of Channel 230A from Seymour to Sellersburg, Indiana, and the modification of Station WQKC's license to specify Sellersburg.

4. Our determination is guided by the fact that, although SCI purchased Station WQKC(FM) after the filing of the petition for rulemaking,⁵ the closing on that assignment application took place one month prior to the June 29, 2001 release of the *Notice*. Petitioners could have sought to revise the initial Fishers petition to include the change in the Fishers site and the proposed reallocation from Seymour to Sellersburg prior to the release of the *Notice* but did not do so. The parties have not given us adequate justification to establish that new and reasonably unforeseeable intervening events prevented them from amending the petition prior to the issuance of the *Notice of Proposed Rulemaking*. The release of a new Notice of Proposed Rulemaking will ensure that the public will have an opportunity to participate fully in the Seymour/Sellersburg reallocation.

5. With regard to the original proposal, we note that the reallocation of Channel 230A from Noblesville to Fishers is mutually exclusive with Station WGRL's existing authorization for Channel 230A at Noblesville, and the proposal to reallocate Channel 283B from Indianapolis to Noblesville is mutually exclusive with Station WGLD's current allotment of Channel 283B at Indianapolis. Accordingly, we will apply the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.⁶ In addition, because the allotment of Channel 230A at Fishers will provide the community with a first local transmission service and the allotment of Channel 283B retains a first local service at Noblesville, this proposal falls within priority (3) of the FM allotment priorities and will serve the public interest.⁷

⁴ In the cases following the *Taccoa* approach, the original proposal to change community was abandoned by the filing of an amendment, proposing to substitute a new community. Here, we have an amendment that proposes a second, unrelated change of community, which is not mutually exclusive with the original Fishers proposal. However, the proposed change in reference coordinates for the Fishers proposal creates a conflict between the two proposals.

⁵ See File No. BTCH-20010214ABB, granted on March 30, 2001 and consummated on May 25, 2001.

⁶ See *Report and Order* in MM Docket No. 88-526 ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("Change of Community MO&O").

⁷ The FM allotment priorities are 1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [co-equal weight given to priorities (2) and (3).] See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

6. We find that Fishers, which is part of the Indianapolis Urbanized Area, is an independent community for allotment purposes. The Town of Fishers, with a 2000 U.S. Census population of 41,011 persons, was incorporated in 1891. According to the factors delineated in *Faye and Richard Tuck, Inc.*,⁸ it fulfills a majority of the factors which prove its independence of the Urbanized Area.⁹

7. We will grant the reallocation of Channel 230A from Noblesville to Fishers, Indiana, and the reallocation of Channel 283B from Indianapolis to Noblesville. We believe that the two reallocations together will serve the public interest. Considering the two proposals together, we believe that they result in a preferential arrangement of allotments because Fishers will gain its first local transmission service and Noblesville retains its sole local transmission service with the added benefit of a higher class channel.¹⁰

8. Channel 230A is reallocated from Noblesville to Fishers at Station WGRL(FM)'s licensed site 7.1 kilometers (4.4 miles) north of the community.¹¹ Channel 283B is reallocated from Indianapolis to Noblesville at WGLD(FM)'s licensed site 26.9 kilometers (16.7 miles) southwest of the community.¹² There is no change of transmitter site and therefore no gain or loss in area or population at either community. Our analysis shows that the proposal to reallocate Channel 230A from Noblesville to Fishers will provide a city-grade signal to 13.8% of the Indianapolis Urbanized Area. Our analysis also shows that while Noblesville is not in the Indianapolis Urbanized Area, the proposal to reallocate Channel 283B from Indianapolis to Noblesville will continue to provide a city-grade signal to 100% of that Urbanized Area. Nevertheless, we will not require an analysis of the community of Noblesville pursuant to the policies enumerated in *Faye and Richard Tuck, Inc.*, because this reallocation does not constitute a migration to an urbanized area. On the contrary, Station WGLD is already present in 100% of the Indianapolis Urbanized Area and is changing its community of license from Indianapolis, the central city, to a community located outside of any urbanized area.¹³

⁸ *Faye and Richard Tuck, Inc.*, 3 FCC Rcd 5374, 5378 (1988).

⁹ Petitioner states that (1) as of 1998, 58% of Fishers residents work in the community for employers such as Sallie Mae, Charles Schwab Co., Banc One Financial Services, Universal Music Hungry Mine, Inc., and Forum Credit Union. (2) There are 2 newspapers serving residents: *The Topic*, both a daily and weekly, and *Image*, a weekly; in addition, the community has its own web page. (3) Community leaders and residents perceive themselves as separate from Indianapolis through a unique identity and history, which began when Fishers was established as a major train station stop. (4) Fishers has its own council-manager form of government with an elected Town Council, President and Clerk-Treasurer. There are 238 employees, and the town has a \$39.1 million budget. (4) The town has its own zip code, post office; telephone books list it separately. (6) There are numerous churches, parks, recreation and commercial establishments, and health facilities. (7) Through its newspapers and webpage, Fishers has many opportunities for local advertising. (8) The library and school system are provided by the county, but water, sewage, fire and police are independently provided by the town.

¹⁰ See *Corinth, Scotia and Hudson Falls, New York*, 16 FCC Rcd 13,304, (MMB 2001); *Bessemer and Tuscaloosa, Alabama*, 5 FCC Rcd 669 (MMB 1990); *app. for rev. granted* 11 FCC Rcd 2967 (1996).

¹¹ The coordinates for Channel 230A at Fishers are 40-00-55 NL and 85-58-58 WL.

¹² The coordinates for Channel 283B at Noblesville are 39-50-25 NL and 86-10-34 WL.

¹³ See *Moncks Corner, Kiawah Island and Sampit, South Carolina*, 15 FCC Rcd 8973, 9892 (MMB 2000), and *East Los Angeles, Long Beach and Frazier Park, California*, 10 FCC Rcd 2864, 2868 (MMB 1995), *recon. den.* 13 FCC Rcd 4692 (MMB 1998).

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g), and (r), and 307(b) of the Communications Act of 1934, as amended, and 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED That effective July 14, 2003, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, as follows:

<u>Community</u>	<u>Channel No.</u>
Fishers, IN	230A
Noblesville, IN	283B
Indianapolis, IN	226B, 234B, 238B, 242A, 277B, 289B, 300B

10. IT IS ORDERED That the Secretary of the Commission shall send by Certified Mail Return Receipt Requested, a copy of this *Order* to the following:

Mark N. Lipp, Esq.
Vinson & Elkins L.L.P.,
The Willard Office Building,
1455 Pennsylvania Avenue, N.W.,
Washington, D.C. 20004-1008
(Counsel to Petitioner)

11. IT IS FURTHER ORDERED That the amended proposal filed by Petitioner and SCI in this proceeding, requesting an alternate site for Channel 230A at Fishers and reallocating Channel 230A from Seymour to Sellersburg, Indiana, IS DISMISSED.

12. IT IS FURTHER ORDERED That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of INDY LICO, Inc., for Station WGRL(FM), Noblesville, Indiana, IS MODIFIED to specify operation on Channel 230A at Fishers, Indiana, in lieu of Channel 230A at Noblesville, and for Station WGLD(FM), Indianapolis, Indiana, IS MODIFIED to specify operation on Channel 283B at Noblesville, Indiana, in lieu of Channel 283B at Indianapolis, Indiana, subject to the following conditions:

- a) Within 90 days of the effective date of this *Order*, each licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.
- b) Upon grant of the construction permit, program tests may not be conducted by Station WGRL(FM) at Fishers in accordance with Section 73.1620 of the rules until Station WGLD(FM) has commenced operation at Noblesville in accordance with Section 73.1620 of the rules.
- c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

13. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change of community. As a result of this proceeding, INDY LICO, Inc., licensee of

Stations WGRL(FM), Fishers, and WGLD(FM), Noblesville, Indiana, is required to submit rule making fees in addition to the fees required for the applications to effect the changes of community for Stations WGRL(FM) and WGLD(FM).

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Victoria M. McCauley, Media Bureau (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau